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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-2273

HERMAN DIAMOND, Petitioner,

versus

UNITED STATES, ET AL, Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit, and in support of its petition respectfully shows:

OPINION BELOW AND JURISDICTION

The case was tried before the Honorable Alexander A. Lawrence, United States District Court, Southern District of Georgia, who entered his Order on April 17, 1973, which is reported at____ _____

The Court of Appeals for the Fifth Circuit rendered its opinion on April 24, 1975, reported at 512 F.2d. 157
The Court of Appeals refused a petition for a rehearing on May 29, 1975.

The Order of the District Court, the

Opinion of the Court of Appeals, and the Order refusing the petition for rehearing are printed in the Appendix hereto.

Jurisdiction of this Court lies under 28 U.S.C. Statue 1254.(1)

QUESTIONS PRESENTED

The questions presented are:

1. The Court of Appeals has decided an important question of Federal law in a way which conflicts with applicable decisions of this Court, and has violated the sovereign rights of the State of Georgia and its citizens under Art. 10 of the United States Constitution and Art. 5 under due process and equal protection in a manner that is inconsistant with the Courts decision in ILLINOIS CENTRAL RAILROAD CO. VS. ILLINOIS 146 U.S. 436, 13 S.Ct.110, 36 L.Ed. 1018, which holds; that marshlands within the Petitioner's boundries belong absolutely to the Petitioner. And if not, should be settled by a definite decision of this Court.

STATUTE INVOLVED

The pertinent statute, Title 33 U.S.C. 403 of the Rivers and Harbors Act of 1899, is set forth in the Appendix, infra, page 5a.

STATEMENT OF CASE

On February 5, 1965, Petitioner Herman Diamond and Mr. Charles Wood, jointly

bought a two acre tract of land bordering on Richardson Creek, having a frontage of 500 feet on the North side of the Oatland Island Road and a depth of 300 to 400 feet to the low water mark of the creek.

The property is bounded on the West by two fixed bridges, one built in 1925 and has a vertical clearance of five feet and the other fixed bridge is 100 yards further west for the new expressway built in 1963 with a ten foot vertical clearance. (DX.2,3,4,5 Vol.1., 8/29/73), and on the East side is the old Government building.

The property was subdivided into 5 lots, selling 2 lots in 1965 to Mr. Tracy Dixon on the west side, leaving the middle lot for the Petitioner and Mr. Wood kept the two lots eastward.

On February 9, 1965 application was made for a permit to build a dock and forty-foot walkway to the high fast land just back of the creek bank. The permit was issued the following day and when the Petitioner picked the permit up at the Engineer's office, he also inquired for an application to bulkhead and fill. The District Engineer and the Chief of permits, both informed petitioner that a permit was not necessary as Petitioner was beyond the low water mark. The new bridge had changed the flow of current and was causing some erosion on the property of Petitioner. In 1966 Petitioner had a deep well dug near the walkway and the electric company installed a forty-foot pole for service to dock and water pump.

The Petitioner had bought the property with the intention of building a home and started to fill the high fast ground to reach an elevation of 12 feet in order to get a building permit. The total area involved was 1/3 of a acre, or 100 feet by a depth of 300 feet to low water. In 1969 the area involved was filled to 10½ feet elevation above M.H.Tide, and until March of 1973 when the dock burnt down, the Petitioner had not been active in the area.

When the dock burnt, inquiry was made to the Engineers to see if a new permit was needed to rebuild the dock. No permit was required and the Petitioner in repairing the dock placed the burnt debris in the washed out areas on the lot and covered it over with six loads of fill dirt. While in the progress, Dr. Fredrick Marland of the Georgia State Department of Natural Resources came by and had Petitioner arrested for filling marsh. The Marshland Act of 1970 was Expost Facto and Petitioner informed Dr. Marland of this fact which enraged him, and which led to the arrest. On March 22, 1974 in the Superior Court of Chatham County, Georgia, a jury of 12 found Petitioner "not guilty". On April 5, 1973 Dr. Marland filed a statement with the Clerk of the District Court that he had seen Petitioner fill the marsh and had violated the state act.

Mr. Lamar Walters, the Assistant United States District Attorney, filed a civil complaint on April 5, 1973 for temporary injunction and punitive damages in the name of the United States of America for vio-

lation of the Rivers and Harbors Act of 1899, Title 33 U.S.C. 403, 407 and 413, under jurisdiction 28 U.S.C. 1345. On April 17, 1974 Judgment charging Petitioner with violation of 33 U.S.C. 403 and permanently enjoining Petitioner from any construction or fill on the property.

The trial court found Petitioner in violation of 33 U.S.C. 403. App. 3a.

This Statue refers to obstruction of the channels of the navigable waters of the United States. Petitioner's marshlands are above and beyond the banks of Richardson Creek as clearly shown on the U. S. Geodetic maps and charts. DX 3, 4,5, 8/29/73 as stated in DeBardeleben Marine Corp. vs. United States, 5th Cir, (1971) 451 F. 2d 140. "What is for mariners to rely on may safely be used by judges."

These navigational charts clearly show the depth of the water in Richardson Creek at low tides.

Georgia Law, Section 85-1303 clearifies that Richardson Creek is not navigable as it does not carry any commerce, foreign or domestic or any trade whatsoever. App.7a.

Conflicting rules of decision within the Fifth Circuit Court of Appeals, affecting rights within the same jurisdiction are an evil of great magnitude and when applied to the tenure of land, would be an intolerable plague.

Navigable waters of the United States,are t hose which are presently used or maybe in the future for purposes of interstate or f-oreign commerce." It is not every small c-reek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, to give it the character of a navigable stream, it mus t be generally and commonally used to some purpose of trade or agriculture."The Monel-lo. 20 Wall,430 (GEORGIA CODE ANN.85-1303

The petitioner respectfully contends that Richardson Creek is not a navigable waters of the United States (1) Testimony of the principal witness,,was that,,he was at the cite in question, One Time (R.Vol 11 App.11 7)and testified that mostly small craft and pleasure boats,that was all the testimony of the government witness,and that due to the bridges along the creek they could not get through,two bridges,permently fixed and fu-ll of snags, (R.Vol.11 App.122) There has been no judicial determination that Richar-dson Creek is used for purposes of Commer-ce and the Corps of Engineers is without authority to require or deny the issuing of permits "the Courts statement (which I credit) para. 5 (R.Vol 11App.46) That Rich-ardson Creek is navigable is based on erron eous conclusions of law and interpretation of facts, and the findings of fact is in co ntradiction of the Judgment issued.(App.3a. The trial court in making its own judicial determination must look to the law,The rule as to navigablillity has been and still is waters used for the purpose of interstate o r foreign commerce."The Government failed to carry the burden of proof as to the na-vigabillity of Richardson Creek,the subje-ct of this action..and that the marshlands

adjoining such streams are the sole propert y of the petitioner and a Riparian proprietor,whose land is bounded by a navigable river, has the rights of access to the navigable part of the river and the right to m ake a landing,wharf or pier for his own use or the use of the public.This riparian ri parian right is property, and is valuable - and the owner can be deprived of it only if necessary that it be taken for the public good,upon due compensation.(Yates v.Milwaukee 77 U.S S.Ct. 10 Wall.497-507) Illinois Central Railroad Co. v.Illinois 146 U.S.436. 13 S.Ct. 110. 36 L.Ed.1018) Philadelphia v.Simpson 223 U.S. 570,. 56 L. Ed. According to the State of Georgia the Riparian rights extend to the low water mark and that is accepted law by this court,.and that no Federal question could be involved therein.(Kenyon v.Knipe,46Fed. 313) App.7a Georgia Code Ann. 85-1309.

Marshlands and similar areas are "navigable in law " but only so far as the area is subject to inundation by the mean high tides" Federal Register Vol. 37. NO. 176 18289 it becomes effective on the date of publication (9/9/72.

From the above the court may conclude three things: First, it is interpretative to the general rule and an assumtion of authority not duly authorized specifically by Congress, Secondly it was published without notice and while everyone is presumed to know the law, it is a rebuttle,presumption and publication without notice would certainly carry no presumption as against the general public,Thirdly,this rule only became effective on September 9,1972.It was not in existance in 1965 when work was begun on Petitioners property,Hence as to the present case IT IS EX POST FACTO. and in direct violati-

on of the Constitution of the United States

The name creek implies, that this is a small body of water and limited in size and distance as show in the DX Vol 1. 345, 8/29 73.

Marshlands are not used for purposes of Nav gation and the lower and trial courts are using the Environmental acts of the Federal government to find petitioner in violation of 33 U.S.C.403, in Stoeco Homes Inc. v.United States 498 F. 2d. 597(1974) found that "Federal Environmental laws do not apply to state or private activities." This is in di rect conflict with the decision of United States v. Moretti 478 F.2d.418.

The trial court"abused its discretion" in finding petitioner in violation of 33 U.S. C.403, The petitioner having to release his attorney due to trial costs far beyon- d his means had to represent himself and found himself at a disadvantage, . . . the trial court ignored the testimony and the witnesses of the petitioner and the illeg- al manner in which this complaint was fil- ed, and it is the petitioners contention th- at the Judgment of the trial court is based on erroneous conclusions of law and interpr etation of facts.

ARGUMENT

THE FIFTH CIRCUIT COURT OF APPEALS HAS DEC_ IDED A FEDERAL QUESTION IN A WAY IN CONFLIC T WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN THAT MARSH L_ ANDS ARE PART OF THE NAVIGABLE WATERS OF TH E UNITED STATES UP TO THE MEAN HIGH TIDES, THIS DECISION IS INCONSISTENT WITH THE SUP- REME COURTS DECISION IN ILLINOIS CENTRAL R- AILROAD COMPANY V. ILLINOIS, 146 U.S.436.

AND VIOLATES THE SOVEREIGN RIGHTS OF THE ST ATE OF GEORGIA,AND THE CITIZENS THEREIN.

On the Georgia coast flood tide covers a vast area of land,500,000 acres or more, which at low tide is exposed to view,for co nvenience, the term marshlands is used., Here if a water course is navigable, it is so because the dept an width of it are sufficient to float useful commerce.If the depth and with is augmented by a periodical increase of water called"tide," that fact may make the stream navigable at those points in it where it is so in fact,to wit,in its channel,but not navigable where it is n ot so in fact,to wit, out of the channel in the marshes.
Georgia laws and the State ConstitutionApp. 7a states that Riparian rights extend to th e low water mark (app.8a. and these Jurisdictional rights can not be violated by any laws of congress or any Federal Agency, The boundries and jurisdiction of the state of Georgia and a special agreement between the state and congressin April 24,1802 when Articles of Agreement and Cession, 7 th. Congress No.69. 1 st.Session Art.11 ceded to the State of Georgia all rights of jurisdiction over the lands within the boundries described. App.13a. and 14a further proof of such agreement is the following Act of the State Legislature to cede the following marshes to the United States for opening on inland waterways,(app.8,9a) and the 1953 Submerged Land Act, 43 U.S.C. 1311 (a)(1)(2) Rights of the States(app.9a)

The Complaint and jugement of the trial court violates these Constitutional Rights of Art. 10 and Art. 5 of due process of Petitioner,Under Riparian rights,an owner is

entitled among other rights(as held in Yates v. Milwaukee, 10 Wall. 497) to access to navigable waters on the front of which lies his land and for that purpose to make a landing, wharf or pier for his own use. Illinois Central Railroad Co. v.Illinois,146 U.S. 436 . The United States Supreme Court has ruled many times on this very right and it is an accepted fact.

Therefore the Regulations for permits by the Secretary of the Army under (33 U.S. C.-1)(App.6a.) are in violation of Art. 5 of due process.

The Corps of Engineers have no jurisdiction over marshlands where no navigability exists in fact. Marshlands within the Petitioners boundries belongs absolutely to the petitioner, Illinois Central Railroad Co. v.People of the state of Illinois,146 U.S. 436;

No testimony or evidence was submitted to to establish Richardson Creek as Waters of the United States,further more two permently fixed bridges and and the physical discription of the waterways in DX,3,4,5 R.Vol 1 8/29/73. and a photo of Petitioner standing in the middle of the creek on sandy mud bottom, (app.Vol 11. 297) (app.vol.11 234 impeaches the witnesses testimony. (DeBordeleben Marine Corp. v.United States 5 cir. 451 F.2d. 140 (1971) "what is for marineers to rely on may safely be used by Judges)

In Moretti v. United States 478 F.2d. 418 the Ecology laws effected the violations of the Rivers and Harbors Act of 1899,

In United States v. Stoeco Homes Inc. 498 F.2d.597 (1974) that the Ecology laws do not effect state or private activity.

The extent that the Federal jurisdiction extends into the waters of the United State s are resolved by state laws was reconized Shively v.Bowlby,152 U.S. 34,43, 38 L.344 347, 14 S.Ct.560,564, Kenyon v.Knipe, 46 Fed.313,

(In United States v. Bigan, 170 F. Supp 219, No.9) In order to justify abatement o f bar in river constituting a nuisance in fact, it would have to be found to have cau sed or likely to cause, an actual material substantial and serious obstruction or impediment to navigation and not merely a fanc iful,trivial,technical or inconsequential one,and danger would have to be imminent a-nd of pressing necessity, and mere possibility or fear of ,future injury to navigatio n from obstruction would not be ground for mandatory injunction.

It is respectfully submitted that the Writ of Certioari should issue.

Herman Diamond

Pro se. Herman Diamond
3610 Macceo Dr.
Savannah Georgia.
31410